STATE OF MICHIGAN

IN THE SUPREME COURT

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, and **JAMES B. LINDEBAUM,**

Plaintiffs–Appellants,

v

JOYCE SCHMITT and **DIANE RANKIN,**

Defendants–Appellees,

and

RONALD SCHMITT,

Defendant.

Supreme Court
No. 130187

Court of Appeals
No. 258021

Bay County Circuit Court
No. 01-3467-CZ

130187

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, and **JAMES B. LINDEBAUM,**

Plaintiffs–Appellees,

v

JOYCE SCHMITT and **DIANE RANKIN,**

Defendants–Appellants,

and

RONALD SCHMITT,

Defendant.

Supreme Court
No. 130574

Court of Appeals
No. 258021

Bay County Circuit Court
No. 01-3467-CZ

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
LAWYERS
LANSING, MICHIGAN 48933

DEFENDANTS' SUPPLEMENTAL BRIEF

DEFENDANTS' SUPPLEMENTAL BRIEF

Submitted by:

Graham K. Crabtree (P-31590)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Defendants
Joyce Schmitt and Diane Rankin
124 West Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

TABLE OF CONTENTS

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

INDEX OF AUTHORITIES

CASES

RULES

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

LEGAL ARGUMENT

By its Order of June 2, 2006, this Court has directed the Clerk to schedule oral arguments on the pending applications for leave to appeal in this case, and has specifically requested that the parties address four questions at oral argument:

1. Whether the trial court erred by considering its post-trial grant of injunctive relief as a basis for awarding case evaluation sanctions;

2. Whether the Court of Appeals erred by comparing the case evaluation and jury verdict for each individual plaintiff as against each individual defendant;

3. Whether the Court of Appeals erred by dividing the $25,000 case evaluation award equally among the five plaintiffs who were parties at the time of the case evaluation; and

4. Whether the Court of Appeals erred by finding that plaintiffs JoAnn Kusmierz and Terry Kusmierz are liable to Diane Rankin for case evaluation sanctions when defendant Rankin never filed or served a request for costs in compliance with MCR 2.403(O)(8).

With regard to the first of the aforementioned questions, Defendants again contend that the trial court's consideration of its post-trial grant of injunctive relief as a basis for awarding case evaluation sanctions in this case was erroneous, as the Court of Appeals has correctly determined. With regard to this issue, Defendants shall continue to rely upon the arguments made, and authorities cited, in their prior filings made in support of their application for leave to appeal, and in response to Plaintiffs' separate application.

With regard to the second of the specified questions, Defendants again contend that the Court of Appeals did err by comparing the case evaluation and jury verdict for each individual plaintiff as against each individual defendant. With regard to this issue, Defendants shall continue to rely upon the arguments made, and authorities cited, in their prior filings,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

and the additional arguments made, and authorities cited, in their discussion of the Court's third question, *infra*.

In response to the third of the aforementioned questions, Defendants contend that the Court of Appeals did err by dividing the $25,000 case evaluation award equally among the five plaintiffs who were parties at the time of case evaluation. Because the Plaintiffs elected a single lump sum award, the Court of Appeals should not have made any allocation of the award among the individual Plaintiffs. However, if the Court should ultimately conclude that an allocation must be made, Defendants respectfully contend that the full amount of the lump sum award should be divided between the remaining Plaintiffs.

The methodology developed by the Court of Appeals in this case divided the $25,000 lump sum case evaluation award equally among the five original Plaintiffs, and then used the evenly divided shares for each of the remaining four Plaintiffs to determine their entitlement to case evaluation sanctions. By doing so, the Court effected an apportionment of the lump sum case evaluation award to yield a total case evaluation award of $20,000, instead of the $25,000 lump sum awarded by the case evaluators pursuant to MCR 2.403(H)(4).[1] Defendants contend that this was inappropriate for several reasons.

First, as noted previously, the court rule contains nothing to suggest that such an allocation may be made in these circumstances, and neither the Plaintiffs, nor the Court of Appeals, have cited any authority allowing this to be done. And, as Defendants have also

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

[1] If the Court should ultimately determine that an allocation of the lump sum award is appropriate, it should note that allocation of the full amount would yield a different result in this case. If the full amount of the lump sum award were allocated between the remaining four Plaintiffs, the award against Defendant Joyce Schmitt would be $4,375 as to each Plaintiff. In that event, Defendant Schmitt would have no liability for payment of case evaluation sanctions to Plaintiffs James and Kim Lindebaum.

noted before, it is very well established in Michigan that liability for payment of attorney fees may not be imposed in the absence of clear statutory or court rule authority. It has become well settled that statutes in derogation of the common law are strictly construed, and that well settled common law principles are not to be abolished by implication. Thus, when an ambiguous statute contravenes the common law, it must be interpreted in a manner that least affects the common law. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652-653; 513 NW2d 799 (1994); *Lewis v LeGrow*, 258 Mich App 175, 183-184; 670 NW2d 675 (2003) The common law rule requiring clear statutory or court rule authority for an award of attorney fees may not be modified by extending liability for case evaluation sanctions in the guise of construction, but that is precisely what the Court of Appeals has done in this case.

Second, the election of a lump sum award was the Plaintiffs' choice, and thus, they should be required to accept the consequences of that choice. Pursuant to MCR 2.403(H)(4), Plaintiffs chose a lump sum award, and saved money by doing so, when they could have requested separate awards against each individual defendant for each individual plaintiff. By choosing a lump sum award under that provision, Plaintiffs elected to have the entire action treated as a single claim – "the plaintiffs may elect to treat the action as involving one claim, with the payment of one lump sum award to be accepted or rejected." Under MCR 2.403(H)(4), the Plaintiffs alone had this choice, and were free to make that choice without regard to the Defendants' preference.

Thus, the Court should conclude that, by choosing a "lump sum award" for "one claim," Plaintiffs understood and accepted the fact that the "lump sum award" that *they* elected would be used to determine their entitlement to case evaluation sanctions as a group.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

Plaintiffs did not have any legitimate basis to expect that the amount of the award would be allocated to effect a proportional reduction for a voluntary dismissal of one or more of the plaintiffs *after* a mutual rejection of the original lump sum award. Moreover, it would be fundamentally unfair to the Defendants to allow an allocation of the lump sum award in this manner because Defendants had no reason to expect that their potential liability for case evaluation sanctions might be *increased*, by virtue of a voluntary dismissal of one or more of the original Plaintiffs before trial, when they were called upon to accept or reject the award. Defendants were not afforded an opportunity to settle this matter by acceptance of the lesser allocated award devised by the Court of Appeals. They were required to accept or reject the award rendered by the case evaluators, and thus, they legitimately expected that their potential liability for case evaluation sanctions would depend upon the Plaintiffs' ability to obtain an adjusted verdict at least 10% greater than that amount.

The Court should note, in this regard, that the methodology devised by the Court of Appeals presents a unique potential for abuse in future cases. If the Court of Appeals' decision in this case is left undisturbed as the law of the state, it is reasonable to expect that additional plaintiffs with questionable claims or minimal damages may be added unnecessarily in many cases, with the expectation that they will be dismissed after case evaluation to accomplish a similar enhancement of the remaining plaintiffs' ability to collect case evaluation sanctions from the defendants. Surely, the Court could not have intended to encourage or allow manipulation of this sort. A construction of the rule having that effect should therefore be avoided.

Third, it would be inconsistent with the purpose of the case evaluation court rule to allow an allocation of the lump sum award in this manner. As noted previously, the case

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

evaluation award afforded the Plaintiffs an opportunity to settle this entire matter for a total sum of $25,000. Plaintiffs rejected that opportunity without knowing whether the Defendants would accept or reject. To award case evaluation sanctions to any of these Plaintiffs when the total adjusted verdict is less than the lump sum award that *they* rejected, is plainly inconsistent with the rule's purpose of promoting settlement. Plaintiffs should not be rewarded with case evaluation sanctions when they have rejected the award, and did not improve their position.

The unfair effect upon the Defendants is similarly inconsistent with the purpose of the rule. As noted previously, Defendants legitimately expected, in the absence of any authority to the contrary, that their potential liability for case evaluation sanctions would be based upon the lump sum award elected by the Plaintiffs. Had they been given any cause to suspect that their potential liability for sanctions would be determined according to a lesser award, allocated in accordance with the methodology invented by the Court of Appeals, they might very well have chosen to avoid that potential by acceptance of the award.

Fourth, the equal division of the lump sum award between the five original Plaintiffs was inappropriate because the case evaluators' award provided no legitimate basis to conclude that the award should have been divided in this manner. Because the Plaintiffs chose single-party status, the case evaluators did not make any specific awards in favor of the individual plaintiffs, and thus, the Defendants did not have the opportunity to accept or reject any such awards. But a different, and perhaps greater, problem is presented by the fact that there is no way of knowing, on this record, what the individual awards might have been if the case evaluators had made such awards. The case evaluators did not make individual awards because the Plaintiffs were entitled to a lump sum award. Thus, there was no basis for the

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

Court's assumption that the lump sum award was made for the equal benefit of each of the five Plaintiffs.[2] The Court of Appeals erroneously made that assumption because "there is nothing in the record to indicate otherwise." There is also nothing in the record to support the assumption made.[3] The record is simply silent on this point, and thus, there was no basis for any assumption. This being the case, there is a very real possibility that the Court's assumption was drastically mistaken.

It is a simple matter to construct scenarios in which the results would have been dramatically different if the case evaluators had made separate awards. If the award had been broken down differently in separate awards to the individual Plaintiffs, it is very possible that Defendant Joyce Schmitt could have owed no case evaluation sanctions, and could have been entitled to her own award of case evaluation sanctions against all of the Plaintiffs. This would have been the result, for example, if the case evaluators had awarded $5,000 in favor of each of the Lindebaums, $2,000 in favor of each of the Kusmierzs, and $3,500 in favor of M Supply Company. In that event, the adjusted verdict determined by the Court of Appeals would have been "more favorable" to Defendant Schmitt than the case evaluation as to each of the four remaining Plaintiffs.

Although Defendant Rankin did not fare as well with regard to the verdict, *vis-a vis* the case evaluation award, it is possible to construct a scenario where she might have been liable to only one of the Lindebaums, with the other being liable to her. This could have resulted if the case evaluators had concluded that the circumstances called for a substantial

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

[2] There is also no basis in the record for any assumption that the Plaintiffs would have shared the settlement proceeds equally if the lump sum award had been accepted.

[3] MCR 2.403(J)(3) provides that "Statements by the attorneys and the brief or summaries are not admissible in any court or evidentiary proceeding." *See*: *Kitchen v Kitchen*, 231 Mich App 15; 585 NW2d 47 (1998)

award in favor of only one of the Lindebaums, with substantially lesser awards for the remaining Plaintiffs. Consider, for example, the result which would have been obtained if the case evaluators had awarded $5,000 in favor of Jim Lindebaum, but only 1,000 in favor of Kim Lindebaum, $600 in favor of each of the Kusmierzs, and $300 in favor of the subsequently dismissed M Supply Co. In that event, Ms. Rankin would have been liable for payment of case evaluation sanctions to Kim Lindebaum, but would have had no liability to James Lindebaum because he, also, had rejected the award, and the adjusted verdict in his favor would not have exceeded the case evaluation award by more than 10%. The Kusmierzs would have been liable to Defendant Rankin for case evaluation sanctions because the adjusted verdicts in their favor would have been more than 10% below the amount of the case evaluation award.

Thus, it may be seen that the methodology devised by the Court of Appeals is flawed for many reasons, and should therefore be rejected by this Court.

If this Court agrees that the methodology devised by the Court of Appeals should be rejected, it should also conclude that Defendants' entitlement to, and liability for, case evaluation sanctions must be determined by comparison of the total adjusted verdict against each Defendant with the separate case evaluation award made against each of them pursuant to MCR 2.403(K)(2). If the liability for case evaluation sanctions is determined in this manner, as it should be, the Plaintiffs will be liable to Defendant Joyce Schmitt because her position was improved by more than 10%, but they will have no liability to Defendant Rankin because her position was not improved. None of the Plaintiffs will be entitled to case evaluation sanctions against either Defendant because they, also, rejected the case evaluation

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

award, and the total adjusted verdict was less, not more, than the lump sum award that Plaintiffs elected pursuant to MCR 2.403(H)(4).

If the liability for case evaluation sanctions is properly determined in this manner, it will be unnecessary for the Court to decide the fourth question posed by its Order of June 2, 2006. However, if the Court should approve the methodology devised by the Court of Appeals, the Defendants contend that Defendant Rankin can, and should, be awarded case evaluation sanctions against the Kusmierzs in accordance with that methodology, despite the fact that she did not make a request for costs in compliance with MCR 2.403(O)(8).

Defendant Rankin did not request an award of case evaluation sanctions in this case because she, and her trial counsel, properly believed that she would not have been entitled to such an award. When the request was filed on behalf of Defendant Schmitt, there was no authority which would have supported a request on Ms. Rankin's behalf. But Ms. Rankin has now been held entitled to an award of sanctions against the Kusmierzs under the Court of Appeals' newly devised methodology, which has also found her liable to the Lindebaums, despite the fact that the total adjusted verdict was significantly *less* than the lump sum case evaluation award.

Thus, it may be seen that Defendant Rankin has been benefited by one part of the Court of Appeals' holding while being severely, and inappropriately, burdened by another. The methodology devised by the Court of Appeals, which would benefit Ms. Rankin to the extent that it would allow an award in her favor against the Kusmierzs, represents an entirely new rule of law which was not foreshadowed by any prior authority. Thus, it is not surprising that Ms. Rankin did not pursue a request for case evaluation sanctions pursuant to MCR 2.403(O)(8).

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

In Michigan, the general rule favors full retroactivity of appellate decisions. *Placek v Sterling Heights*, 405 Mich 638, 664; 275 NW 2d 511 (1979); *Ward v Siano, et al.*, ___ Mich App ___ ; ___ NW2d ___ (Court of Appeals Docket No. 265599 *rel'd* 4-13-06). Accordingly, even when retroactive application is limited, the usual practice is to apply the holding to the case at hand. *Wayne County v Hathcock*, 471 Mich 445, 484; 684 NW 2d 765 (2004)

Defendants contend that that it was appropriate, under the highly unusual circumstances of this case, for the Court of Appeals to allow Defendant Rankin the small benefit to be derived from its holding, even though she had not filed a request for sanctions. The Court of Appeals had the authority to do so pursuant to MCR 7.216(A)(7), which allows the Court to "enter any judgment or order or grant further or different relief as the case may require." It would be fundamentally unfair to Ms. Rankin to require her to shoulder the burden of the new rule of law announced by the Court of Appeals' decision without also allowing her to enjoy its small element of benefit. Thus, the Defendants respectfully suggest that Defendant Rankin should be held entitled to an award of case evaluation sanctions against the Kusmierzs, and should be allowed an appropriate opportunity to request such an award on remand, if this Court should approve the new methodology devised by the Court of Appeals.

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

RELIEF

WHEREFORE, Defendants Joyce Schmitt and Diane Rankin respectfully request that this Honorable Court grant their Application for Leave to Appeal or other appropriate peremptory relief. Specifically, Defendants request that the trial court's post-judgment Orders of August 31, 2004 and September 8, 2004 be reversed, and that this case be remanded to the circuit court with instructions to award case evaluation sanctions in favor of Defendant Joyce Schmitt.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
Attorneys for Defendants-Appellants

By: _____

Graham K. Crabtree (P-31590)
Nicole L. Proulx (P-67550)
124 W. Allegan St., Suite 1000
Lansing, Michigan 48933
(517) 482-5800

Dated: July 14, 2006

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933